GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Health
Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. NANNIE W. GHEE Respondent	Case No.: I-00-40001

DECISION AND FINAL ORDER

I. Statement of the Case and Prior Proceedings

This case arises from a charge under the District of Columbia Civil Infractions Act (D.C. Code §6-2701, *et seq.*) that Respondent, the owner and operator of child development facility, committed an illegal act by unlawfully hitting a child under her care on or about December 13, 1999.[1] Respondent was issued the above-captioned Notice of Infraction for violation of 29 DCMR 306.1(c) and entered a timely plea of Admit with Explanation together with an application for a reduction or suspension of the applicable fine. An order was issued permitting the Government to submit a response. A copy of that Order was served on Respondent and on the Government on January 20, 2000. The Government, through counsel, filed a response to Respondent's application opposing any reduction of the fine and submitting documentation of

[1] In the interest of privacy, the child and his mother have not been identified by name in this Order.

the alleged battery and other supporting evidence. No further submissions were made by or on behalf of Respondent or the Government.

In support of her application, Respondent submitted a letter describing the circumstances of the charged violation. Respondent does not deny hitting the child, but characterizes it as minor in nature, calling it a "tap" on the child's leg. Respondent asserts that her action was in response to the child having removed a full fecal diaper while standing in the middle of a room in the Respondent's facility, and asserts that the child was not harmed by her action. Respondent further asserts that she reported the corporal punishment to the child's mother on the date of the incident. Respondent notes that she has cared for children throughout her adult life. She states that she attempted to locate a bruise on the child after the child was hit, but did not locate it. Respondent's letter recognizes that the child's mother found the administration of corporal punishment to have been objectionable. The Respondent does not contend that the mother at any time gave her express or implied permission to administer corporal punishment. The Respondent characterizes her relationship with the child's mother as "positive."

In opposing Respondents' application, the Government submitted evidence that the child in issue was two years old at the time of the incident. The Government takes issue with the Respondent's characterization of the hitting as a "tap." The Government submitted a report from the child's mother claiming that the bruises were visible on the child's buttocks. The Government further asserts that the Respondent gave an oral statement to the Department of Health's child care facility inspector that the child was "popped" for urinating on the floor. The Government's documents also indicate that the child whom Respondent hit is developmentally

delayed. Nothing in the record contradicts that evidence. The Government's documents confirm the Respondent's statement that the two-year-old child removed his diaper, and that his bodily waste came in contact with the floor.[2]

II. Findings of Fact

Based on the submissions of the parties, and the entire record in this case, the administrative court finds that:

1. Respondent has admitted liability for the offense charged in the above-captioned case, and is liable for it;

2. Respondent has a current license for child development facility issued June 1, 1999 and expiring May 31, 2000 (908791-CDH);

3. The child in question was two years of age at the time of the incident and is developmentally delayed. These two factors make the child specially vulnerable;

4. On or about December 13, 1999, Respondent hit the child in response to his removing his diaper with the result that either his urine, feces, or both, came into contact with the floor or other surfaces in Respondent's child development facility. This occurred

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[2] The documents provided by the Government contradict the Respondent's statement in stating that urine was involved rather than feces, but as discussed, *infra* in pp. 4-6, the distinction is not material here.

while the child was in the Respondent's care and control as a licensed child care provider;

5. The child's mother found the punitive hitting objectionable. Further, the child's mother had not authorized Respondent to administer corporal punishment to her child. The mother believed she detected bruises on the child that she attributed to this act of corporal punishment and was disturbed by this finding;

6. Respondent has cared for children throughout her adult life and has been a preschool teacher. The Government has not asserted that Respondent is a recidivist;

7. Respondent intentionally and offensively touched the child without authority to do so; and

8. Respondent has failed to accept responsibility for the wrongfulness of her unlawful conduct;

III. Discussion

Based on the record in this case, a downward adjustment of the specified maximum fine of $500 is not appropriate. This conclusion is supported by the nature and severity of the incident. The Respondent admits that she struck a two-year-old in response to the child misbehaving and soiling the facility. Respondent seems to claim that the physical striking at

issue was somehow justified in response to the child's behavior. The Respondent's assertion is wholly without merit.

The physical contact in issue, regardless of its disputed severity, constitutes an unlawful battery. *See Marshall v. District of Columbia*, 391 A.2d 1374; 1380 (D.C. 1978). The wrongfulness[3] of Respondent's unlawful act is compounded by the special vulnerability of the victim, in this case a two-year-old child with developmental delay. There is no children's misbehavior exception to 29 DCMR 306.1(c). Parents properly expect that their children will not be subjected unlawful acts when placed in the care of a licensed child development facility. Indeed, a child care provider should be uniquely aware of the need to exercise restraint and judgment when dealing with the misbehavior of a two-year old with inherently limited understanding of proper and improper conduct. This administrative court can conceive of no circumstance in which unprivileged corporal punishment of a two-year-old (particularly one who is developmentally delayed) by a licensed child care provider can be justified. In addition, the risk of physical injury and the risk of trauma to the victim in light of his developmental disabilities further compound the severity of this incident. And although the record presented to the administrative court was insufficient to find the presence of bruises connected to the battery[4],

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[3] The law provides for certain defenses to a claim of battery, privilege being the one that is relevant here. *See,* Prosser & Keeton, Torts (5th Ed., 1988) §16. Such a privilege might exist if the mother had authorized corporal punishment of the child. The mother's reaction and conduct following her learning of the corporal punishment, as documented in both Respondent's and the Government's submissions, make clear that she had not given Respondent permission to administer corporal punishment to her child while acting *in loco parentis.* Equally important, Respondent does not make such a claim of privilege.

[4] The documents supplied by the Government indicates that the alleged bruises were documented on videotape. Unfortunately, this tape was not provided to the administrative court with the Government's written submission and therefore could not be a basis for a finding of fact in this disputed issue.

the adverse impact on the child's mother based on her belief that her child was unlawfully battered and bruised is apparent from the record.

The serious nature of the operative facts in this case does not support downward adjustment or suspension of the fine. Additionally, the Respondent has cited no affirmative mitigating facts and circumstances of the type that may sometimes justify a downward adjustment or suspension of a fine. Specifically, the Respondent's submission demonstrates she has not accepted responsibility for the wrongfulness of her conduct, and instead seems to justify her conduct as being provoked by a two-year-old. Further, she has offered no assurance that this will not occur again, thus precluding possible reduction of the fine on that basis. *See e.g.* D.C. Code §6-2703(a)(3) and (a)(6); *see also*, 18 U.S.C. §3553; U.S.S.G. §2A2.3, §3A1.1, and §3E1.1, (containing objective criteria used by the United States in numerically adjusting penalties for offenses involving certain types of conduct). For all of the foregoing reasons, there will be no downward adjustment of the fine.

IV. Conclusions of Law

The Office of Adjudication and Hearings concludes, based on the record before it, that a downward adjustment from the specified maximum fine of $500.00 will not be granted in this case. Respondent is fully liable for the fine of $500.00.

Therefore, upon Respondent's answer and plea, her application for reduction or suspension of fine, the Government's opposition, and the entire record in this case, it is hereby, this _____ day of _____, 2000:

ORDERED, that the Respondent's application for a reduction or suspension of the fine is denied; and it is further

ORDERED, that Respondent shall cause to be remitted a single payment totaling **FIVE HUNDRED DOLLARS ($500.00)**, in accordance with the attached instructions within fifteen (15) calendar days of the date of mailing of this order. A failure to comply with the attached payment instructions and remit a payment within fifteen (15) days will authorize the implementation of additional sanctions, including the suspension of the Respondent's license or permit pursuant to D.C. Code § 6-2713(f).

/s/ 3/30/00

Paul Klein
Chief Administrative Law Judge